IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3953 of 1990

1. Shri N.K.P.Hussain Abdul Rahman

2. Shri Innaskhan Suleman Khan

3. Shri Sultan Khan Rajjad Mohmood

Dist. Pune .. Petitioners

(Orig.Deft nos.

vs 1,3 & 4)

1. Shri Popatlal Damodar Parekh

2. Shri Kadar Kutti

3. Shri N.K.Mussa Rajjad

3 (a) C.V.Tahira w/o N.K.P.Abdul

Rahman age 35.

3. (b) C.V.Ismail S/o N.K.Moosa

age 29.

3. (c) C.V.Asskari Banu w/o Usman

age 24 yrs.

3. (d) C.V.Shahnaz w/o Muhamed

age 22 yrs.

3. (e) C.V.Ameer S/o Moosa age 20

3. (f) C.V.Abida, D/o Moosa age 16

3. (g) C.V.Mashuda D/o Moosa age 16

All residents of Cherikelli House,

Post Mulapilangad via Edkkad

Dist Cannanur

State of Kerala

.. Respondents

Mr.G.S.Godbole with Mr.G.H.Keluskar for Petitioners

Ms Suhasini Mutalik for Respondent no.1

CORAM : D.G.KARNIK, J

DATE: 13TH AUGUST, 2004.

P.C.

1. By this petition, the petitioner-tenant challenge the judgment and order dated 27th July, 1990 passed by the Vth Additional District Judge, Pune dismissing

.3.

Civil Appeal No.677 of 1987 and thereby confirming a decree for possession passed on 4th April, 1987 by the Civil Judge, Junior Division, Vadgaon-Maval.

The facts necessary for the decision of this petition are stated below :

2. The respondent no. 1 is an owner of the property bearing House No.33, situated at F Ward, Lonavla District Pune. Out f the said property one shop

(hereinafter referred to as the suit premises) was let out to the petitioner no.1. The Courts below have held that the suit premises were let out to the petitioner no.1 and the respondent no. 3 who has since died and is represented by his legal representatives. It is however immaterial for the purpose of this petition as to whether the petitioner No. 1 alone was the tenant or he and the respondent no. 3 were joint tenants. The respondent no. 1 initially filed a suit for possession against the petitioner no. 1 on the ground of default in payment of rent, non user, permanent alterations and bonafide requirement. During the pendency of the suit, the plaint was amended twice. By the first amendment, the respondent no.2 was joined as a party defendant alleging that during the pendency of the suit, the premises were sublet to the respondent no.2. The trial Court has recorded a finding that the premises were not sublet by the petitioner to the respondent no.2 and that finding is not challenged before me. By the second amendment, it was pleaded that subsequently the petitioner no. 1 had sublet the suit premises to the petitioner numbers 2 and 3 who were added as party defendant nos. 4 and 5 to the suit. The petitioners resisted the suit contending that all three of them and the respondent no. 3 were the partners carrying on business in partnership and that the petitioner numbers 2 and 3 were not the subtenants. The original partnership deed along with a certificate of registration of the firm under the Partnership Act was produced by the petitioners. After taking into consideration the evidence of the parties the trial Court held that the alleged partnership between the

petitioners and the respondent no.3 was not genuine but was colourable and in fact the petitioner nos. 2 and 3 were the sub-tenants in the suit premises. The trial Court therefore decreed the suit on the ground of subletting. All other grounds for possession were rejected. On appeal, by the judgment and order dated 27th July, 1990 the appellate Court confirmed the finding that the partnership was not genuine and that petitioner no. 1 had sublet the premises to the petitioner nos. 2 and 3. That judgement is impugned in this petition.

3. At the outset, learned counsel for the respondent no.1 submits that whether the petitioner nos. 2 and 3 were the partners or sub-tenants and whether the partnership between the petitioners and the respondent no.3 was a genuine or the partnership deed or was a colourable device are questions of fact. This Court cannot, in exercise of writ jurisdiction under Article 227 of the Constitution of India, interfere in the concurrent findings of fact reached by the Courts below. Whether there exists a partnership or not may in certain cases be a mixed questions of law and facts in a sense that whether the ingredients of partnership as embodied in the law of partnership exist or not in a particular case is required to be decided in the light of principles applicable to partnership. (See Helper Girdharbhai vs Saiyed Mohmad Mirasaheb Kadri reported in AIR 1987 SUPREME COURT 1782) In Resham Singh vs Raghbir Singh reported in (1999) 7 Supreme Court Cases 263 the Supreme Court held the question of subletting is a conclusion on a question of law derived from the findings on the materials on record

such as transfer of exclusive possession and whether such a transfer is for consideration. Therefore, the contention that this Court cannot examine whether the finding that the partnership was colourable or not has to be rejected.

4. In my view, for determining whether there existed a partnership between the petitioners and the respondent no. 3 (since deceased) it would be necessary first to look at the deed of partnership dated 1st January, 1983 (Exhibit 154 in the suit) as a whole and then clause by clause. The Courts below have referred to various clauses of this deed and interpreted them to consider whether the partnership deed was real or a camouflage to hide the real intention of the parties of creating a sub-tenancy. The deed, looked as a whole clearly indicates that it is a deed of partnership. Looking to the deed clause by clause would also show that the real intention of the parties was to enter into a partnership. However, before referring to the various clause of the Partnership deed it would be useful to refer to the several circumstances which have been relied upon by the Courts below to come to the conclusion that the petitioner nos. 2 and 3 were the sub-tenants. They are summarised below :

(i) the petitioner no. 1 did not have a ration card at Lonavala and therefore must not be living at Lonavala and not taking part in carrying on the business of partnership;

(ii) though the petitioners had produced the books of

account of the partnership, they were not proved and therefore, adverse inference was drawn.

(iii) the petitioners and respondent no. 3 were drawing a sum of Rs.500/- per month from the partnership towards their share of profit. Clause (a) of the partnership deed allowed the partners to draw Rs.500/- per month. Drawing of a fixed sum per month was indicative of sub-tenancy;

(iv) the petitioner no. 1 had not contributed any capital in cash in the partnership but furniture and fixtures in the shop were valued at Rs.30,000/- and taken as his share capital. This showed fictitious nature of the partnership ;

(v) the partnership had not opened any bank account ;

(vi) clause no. 14 and 15 of the partnership deed were contradictory. Clause no. 14 states that partnership was at will, clause 15 states that any partner will be entitled to retire from the partnership by one month's notice in writing and the remaining partners will continue the business. Therefore, partnership was not genuine;

(vii) the petitioner no. 1 was conducting a hotel by name Welcome Restaurant at Panvel and must be residing permanently at Panvel; therefore, he could not pay personal attention to the partnership business in the suit premises ;

(viii) the uncle of the petitioner no. 2 had provided

a loan of Rs.10,000/- to the partnership firm. That uncle was manufacturing bakery products which were sold in the suit premises. The uncle had an eye on the suit premises for the purpose of sale of his bakery products and the petitioner no. 1 must have sublet the premises to the petitioner nos. 2 and 3 for sale of bakery products manufactured by the uncle of the petitioner no.2.

5. Learned counsel for the parties also took me through the various clauses of the deed of partnership which was produced at Exhibit 154 in the trial Court. According to the learned counsel for the respondent no.1 the partnership deed clearly shows that it was a colourable document and a cloak to cover the real intention of the parties which was to sublet the suit premises to the petitioner nos. 2 and 3. On the other hand, learned counsel for the petitioners submits that the reading of the partnership deed as a whole would show that they were really intending to carry on the business in partnership. Section 4 of the Partnership Act, 1932 defines a partnership to be a relation between persons who have agreed to share the profit of business carried by all or by any of them acting for all. The essential ingredients of a partnership are :

(i) existence of a business.

(ii) an agreement between the parties to share the profits of that business ;

(iii) the business must be carried on by all of them

or any of them acting for all. It contemplates mutual agency betwen the partners; when one partner carries on business for all and he acts as agent for all, and when two or more partners carry on business they act as agents for all.

The document Exhibit 154 shows that the business was to be carried on by the petitioners and the respondent no. 3 in the name and style of " M/s Milan Stores" at House No.33 or such other place as may be mutually agreed upon. Under clause 6, the profits and lossess of the business were to be shared equally each partner having 25 % share in the profit and loss. Under clause 9 each partner was entitled to draw Rs.500/- per month on account and the amount drawn was to be debited to their account and at the end of accounting year the accounts were to be settled and the excess amount if any, drawn by a partner was to be paid to the firm immediately. Thus, all the three ingredients which are necessary to constitute a partnership viz. existence of a business, agreement to share profits and the agency between the partners are found in the partnership deed.

6. Learned counsel for the respondents contends that the petitioner no. 1 had not contributed any capital in cash. The recitals in the partnership deed that he had contributed Rs.30,000/- by contributing furnitures and fixtures was false. The Courts below have found that the petitioner no. 1 had not contributed any furniture and therefore, it must be held that the partnership deed was colourable. Contribution of capital in cash or otherwise by a partner is not an

essential ingredients of a partnership. Often the capital is contributed by all partners, but that is not necessary. It many cases the capital is not contributed by the partners equally and in some cases, capital may not be contributed by one or more the partners at all. This is especially so when some partners are taken as working partners.

7. Learned counsel for the respondent places strong reliance on clause No.15 of the partnership deed. The clause says that partnership would not be dissolved at free will of any of the partners but, the partner who did not wish to continue could retire from the firm with one month's notice in writing and remaining partners would continue the business in partnership with necessary mutual adjustment; the firm could can be dissolved with the consent of all the partners. This clause is at variance with cluse no. 14 which says that partnership would be at will. Learned counsel for the respondents submits that the recitals in clause no.14 that the partnership would be at will was not correct and the real intention of the parties was expressed in clause no.15. Assuming so, I fail to see how the partnership which is not at will ceases to be a partnership or becomes unreal and colourable. Clause No. 15 of the partnership deed, per se, is no evidence of colurable nature of partnership. Law does not require the partnership only to be at will to constitute a partnership. Section 7 of the Partnership Act provides that where no provision is made by contract between the partners for duration of the partnership or for determination of their partnership, the partnership would be partnership at

will. There is only a presumption of partnership to be at will when there is no provision for its duration or dissolution. Many real partnerships are formed of for a single venture. They come to an end when the venture is over. They are not at will and cannot be terminated till the venture is over. Merely because a partnership is not at will it does not mean that the partnership is unreal or fictitious. The variance between clause nos. 14 and 15 may give rise to a dispute between the partners as to the manner of its determination or dissolution. But that would not in any way invalidate the partnership. Therefore, in my view neither clause nos. 14 nor clause 15 could be constituted to mean that there was no real partnership between the petitioners and the respondent no. 3.

8. None of the eight circumstances held by the Courts below against the petitioners either singly or cumulatively justify a conclusion in law that partnership between the petitioners and respondent no. 3 created by the deed of partnership at Exhibit 154 was unreal. It is not necessary that each of the partner must reside in the town in which partnership business is carried out. The very concept of mutual agency contemplated under the Partnership Act would be destroyed if each of the partners was to physically remain present in the town and in the suit premises to carry on the business. The day to day business can be carried on by one of more partners for and on behalf of all. The other partners may not take part in the day to day business and may reside in a different town. If the account books are not produced, adverse inference can certainly be drawn for the non

production. But, no adverse inference could be drawn as the account books were produced but not proved in accordance with the law relating to the proof of documents. Adverse inference can be drawn for non-production of a document or evidence in possession of a party to a suit but I know of no law which permits adverse inference to be drawn when the document is produced but the producer is unable to prove the document in accordance with the law relating to proof of documents. Under the Partnership Deed, each partner was allowed to draw a sum of Rs.500/- per month provisionaly. At the end of year, the accounts are to be drawn and if any withdrawal made by a partner were in excess of his share, he is required to forthwith pay the difference to the firm vide clause 9 of the partnership deed. Therefore, the mere fact that the petitioners were allowed to draw a sum of Rs.500/- per month by itself or in conjunction with other factors discussed above, would not be sufficient to hold that Rs.500/- was the rent charged by the petitioner no. 1 for subletting the premises. Again the fact that the petitioner is also having other business namely Hotel Welcome at Panvel is also not a circumstances to indicate that the partnership is not real or that the petitioner is not a partner. A person may become a partner or a director in many companies. The Companies Act, 1956 atleast provides a limit as to the number of companies in which a person can be a director; there is no such restriction under the Partnership Act as to the number of firms in which a person can be a partner. In the present case, at the most, it is proved that the petitioner no.1 is a partner in one more concern and owns some property at

Panvel. That is not the circumstance to hold that the partnership created by Exhibit 154 is unreal or fictitious. The fact that a loan Rs.10,000/- has been given by uncle of the petitioner no. 2 is also not a circumstance to hold that the partnership is not real. It is not the case that uncle of the petitioner no.2 is a sub-tenant. It is also not the case that Rs.10,000/- were paid by the uncle of the petitioner no.2 either as a premium or consideration for subletting. May be that the uncle of the petitioner no. 4 was interested in selling bakery products and the suit premises was a good retail outlet. But,that would be a commercial transaction between two contracting parties. It is not uncommon that for manufacturing of goods or as retailor of goods to give to the other some deposit to a manufacturer or vice versa. Such deposits are commonly given in business and the terms depend upon the strengths of one and the needs of the other of the contracting parties.

9. Non opening of bank account is also not a circumstance to hold that there is no partnership taking into consideration that the business which is carried on in the suit premises iss only of bakery. In respect of a small bakery in a small town the sales business are mostly if not invariably in cash; Credit if any is given at the discretion of the partners at counter and for short duration. The purchases are often in cash. If it is the case of the respondent no.1 that the principally bakery products of the uncle of petitioner no. 2 were being sold in the suit premises, then even the purchases may only be in cash. The books of accounts were produced on record and it

was not shown by the respondent no. 1 that any large sales were effected for having necessity of transacting through a bank.

10. The law as to when a tenant who ostensibly enters into a partnership would be deemed to have sublet the premises to the ostensible partners or a firm has been succintly laid down by the Supreme Court in its recent decision in ParvinderSingh vs Ram Gautam reported in (2004) 4 SCC 794 in the following words :

> " 8. The rent control legislations which extend may a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations is sub-letting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not this transferee inducted into possession of the premises in breach of the contract or the law which act is often done with the object of illegitimate profiteering or rack-renting. To defeat the provisions of law,, a deviode is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sub-let the premises or parted with possession there of in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him may be along with the partners the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has beeen parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant. "

" 9. A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, amere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against sub-letting or parting with possession. This is general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sub-lets the premises or parts with possession in defiance of the terms of lease or the rent control legislation andin order to save himself from the peril of eviction brings into existence, a deed of partnership between him and his sub-lesee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross examination, making out acase of sub-letting or parting with possession or interest in tenancy premises by the tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is therefore not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded mereby by availability of writing reciting the transaction. Tyanaraja Mudaliyar vs Vedathanni is an authority for the proposition that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different. A lease of immovable propeprty is tranfer of a right to enjoy such property. Parting with possession or control over the tenancy premises by the tenant in favour of a third person would amount to the tenant having "transferred his rights under the lease" within the meaning of Section 14 (2) (ii) (a) of the Act. " (Underlining supplied)

11. Applying the tests laid down by the Supreme Court

in Parvinder Singh's case the inference is irrestible that the partnership witnessed by the Deed Exhibit 154 is real and not colourable, sham, or as a device to evade the provisions of the Bombay Rent Act. The finding of the Courts below that the partnership is not real and a camouflage is based upon a mis-interpretation of the document of partnership and proved facts of the case. In the facts and circumstances of the case, the judgments of the Courts below cannot be sustained and are required to be set aside. Accordingly petition succeeds. The impugned judgment and order is set aside and suit of the respondent no. 1 is dismissed with costs. Rule made absolute with costs.

D.G.KARNIK, J